**DWITASIK SDN BHD**

**v.**

**KETUA PENGARAH INSOLVENSI**

HIGH COURT MALAYA, KUALA LUMPUR
TEE AH SING J
[CIVIL SUIT NO: S7-21-197-2004]
15 JANUARY 2010

***BANKRUPTCY:*** *Proof of debt - Setting aside proof of debt - Application for - Amount owing not specifically stated in proof of debt - Application to set aside allowed - Whether judgment creditor may refile new proof of debt - Earlier proof of debt set aside on technical ground and not on merits - Whether proof of debt can be refiled*

***BANKRUPTCY:*** *Receiving and adjudication order - Rescission and annulment - Director General of Insolvency ('DGI') failing to take into account judgment creditor's proof of debt - Judgment creditor not given notice about hearing of annulment application - Remainder of judgment debtor's assets released by DGI - Whether DGI in breach of statutory duty to judgment creditor - Bankruptcy Act 1967, s. 66(2)*

Mohd Kamarul Baharin Osman ('Mohd Kamarul') was a former director of the plaintiff and he owed the plaintiff a sum of RM1,109,418.45 which was a personal loan granted to him. Mohd Kamarul himself admitted owing the plaintiff this sum. Whilst Mohd Kamarul was a managing director of the plaintiff, no action was taken against him. However, when subsequently the plaintiff proceeded to claim for the monies owed, it was discovered that Mohd Kamarul was already a bankrupt. The action was thus withdrawn and a proof of debt ('the 1st proof of debt') was filed with the defendant on 23 February 1999. However, the 1st proof of debt lodgment was incomplete as a sealed or certified copy of the judgment and latest statement of accounts were not attached. The plaintiff's solicitors then re-lodged the 1st proof of debt with the relevant supporting documents. On 26 April 2002, the defendant admitted the 1st proof of debt declaring that the plaintiff was entitled to receive the dividend in the amount of RM1,109,418.45. Mohd Kamarul then applied to set aside the 1st proof of debt in the High Court. The application was allowed on 11 June 2004 on the grounds that the amount owing from Mohd Kamarul was not specifically stated in the 1st proof of debt. The plaintiff's solicitors then on 23 June 2004 refiled the proof of debt,

this time specifically stating the amount owing by Mohd Kamarul. However, it was then discovered that Mohd Kamarul had on 20 July 2004 successfully applied to set aside the Adjudication and Receiving Order. This was done without taking into account the plaintiff's 2nd proof of debt. The plaintiff was not given notice about the hearing of Mohd Kamarul's application. The plaintiff was unable to injunct Mohd Kamarul from receiving the return of the balance of his assets since the defendant had already released the remainder of Mohd Kamarul's assets. Hence, the plaintiff commenced this present suit against the defendant alleging that the defendant had breached its statutory duty to the plaintiff.

**Held (allowing plaintiff's claim with costs):**

**(1)** In the order dated 11 June 2004, it was clearly recited that the acceptance of the form was set aside. The order did not say that "admission" or "akuan" of the proof of debt was set aside. This could only point towards the acceptance of the form and not the admission of the proof of debt. The court did not go beyond the form and was solely concerned with a point of form, and not on the merits. Hence, the setting aside of the 1st proof of debt by the High Court on 11 June 2004 was on the technical ground that the amount and the consideration were not stated in the 1st proof of debt form and not on the merits. (paras 93 & 98)

**(2)** It followed that the 2nd proof of debt lodged with the defendant on 23 June 2004 to specifically state the amount of RM1,109,418.45 and the consideration was perfectly proper in law. The plaintiff was entitled to present afresh the 2nd proof of debt which the plaintiff did instead of an appeal. (paras 102 & 103)

**(3)** It was the statutory duty of the defendant to examine the 2nd proof of debt lodged on 23 June 2004 as the property of Mohd Kamarul was still vested in the defendant. The defendant had breached its statutory duty by not examining the 2nd proof of debt and informing the plaintiff whether the 2nd proof of debt was accepted or rejected before the hearing of the annulment application on 20 July 2004. The defendant's failure to give notice under s. 66(2) of the Bankruptcy Act 1967 to the plaintiff on the declaration of final dividend was a clear breach of its statutory duty. It was the duty of the defendant to inform the plaintiff of the annulment of the bankruptcy application. (paras 109, 110, 117 & 118)

**(4)** There was no remedy under the Bankruptcy Act 1967 as the bankruptcy had been annulled on 20 July 2004 and the balance of the monies released to Mohd Kamarul on 26 July 2004 without the knowledge of the plaintiff. As such, the defendant was liable to the plaintiff for breach of its statutory duties. (paras 128 & 129)

**Case(s) referred to:**
*Hu Sepang v. Inspector Keong On Eng & Ors [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 HC* ***(refd)***
*Hup Hin Soon Sdn Bhd v. Chong Kin Lin & Anor [2002] 5 MLJ 356* ***(refd)***

**Legislation referred to:**
Bankruptcy Act 1967, ss. 42, 66(2), (6), 92(1), Sch C rr. 26, 28
Bankruptcy Rules 1969, rr. 89(b), 178, 186

**Other source(s) referred to:**
*Re Deerhurst, Ex Parte Seaton (1891) Morrell's Bankruptcy Reports 258*, p 262

*For the plaintiff - TJ Su (EL Teh & Abdullah Khubayb with him); M/s Cheah Teh & Su*
*For the defendant - Siti Badariah Mohd Yusof SFC*

*Reported by Amutha Suppayah*

## JUDGMENT

**Tee Ah Sing J:**

**[1]** At the commencement of the trial, the Ikatan Pliding was marked as Lampiran 40 and the Ikatan Bersama Bahagian A and B was marked as Lampiran 41.

**[2]** Subsequently the learned counsel for the plaintiff stated that for items 30, 32, 34, 37, 38, 39, 40, 41, 43 and 45 of encl. 41 Part B, the makers shall be called before the contents are admissible.

**[3]** After hearing submissions, I ruled that for items 30, 32, 34, 37, 38, 39, 40, 41, 43 and 45 of encl. 41 Part B there is an express condition that the makers must be called and if the makers are not called then the facts stated therein are not admissible.

**[4]** On 31 July 2009 the Ikatan Isu-Isu Yang Dipersetujui untuk Perbicaraan dan Pernyataan Fakta was marked as Lampiran 42.

**[5]** At the commencement of the trial the learned counsel for the plaintiff and the Senior Federal Counsel for the defendant did not state to the court or inform the court that the trial is limited to the issue of liability only and that in the event that the issue of liability is established then damages to be assessed at a later date.

**[6]** As I did not make any ruling that the trial is limited to the issue of liability only the trial proceeded on the basis of both liability and damages together.

**The Case For The Plaintiff Is As Follows:**

**[7]** Wong Kang Yeow ("PW1") in his witness statement ("PW1A") said that he joined the plaintiff in 1995. From 1999 to 2004 he was the manager. He did not know Mohd Kamarul Baharin Osman ("Mohd Kamarul") personally. But he knew from the plaintiffs' records that Mohd Kamarul was a director of the plaintiff from 14 December 1988 to 29 June 1995. Mohd Kamarul also owed the plaintiff a sum of RM1,109,418.45 which was a personal loan granted to him. From the plaintiffs records, Mohd Kamarul himself admitted owing the plaintiff this sum.

**[8]** Whilst Mohd Kamarul was a managing director of the plaintiff no action was taken. However when PW1 joined the plaintiff PW1 subsequently found out that he owed the plaintiff a sum of RM1,109,418.45 and thereafter proceeded to claim for the monies owed.

**[9]** The plaintiff appointed solicitors Messrs Rahman Hashim & Partners which was previously known as Messrs Rahman Hashim, VT Ravindran & Partners in 1999. Legal action was taken against Mohd Kamarul. However when it was discovered that Mohd Kamarul was already a bankrupt, the action was withdrawn.

**[10]** Upon the solicitor advice, a proof of debt ("the 1st proof of debt") was filed with the defendant on 23 February 1999. The 1st proof of debt was affirmed by PW1 (pp. 45 and 46 of encl. 41). The defendant sent a letter dated 1 March 1999 to

their solicitors, Messrs Rahman Hashim & Partners stating that the 1st proof of debt lodgment was incomplete as a sealed or certified copy of the judgment of the court and latest statement of accounts as at 4 February 1999 were not attached.

**[11]** He instructed their solicitors to lodge the 1st proof of debt again with the relevant supporting documents. Their solicitors then wrote to the defendant's office *vide* a letter dated 9 March 1999 at p. 25 of encl. 41 forwarding the 1st proof of debt together with supporting documents.

**[12]** In this letter their solicitors explained to the defendant that judgment against Mohd Kamarul was not pursued because they found out that he was already a bankrupt. Mohd Kamarul admitted that he owed the plaintiff RM1,109,418.45.

**[13]** Mohd Kamarul signed a confirmation request to the effect of admitting the debt to the plaintiff for an amount of RM1,109,418.45 (p. 60 of encl. 41).

**[14]** In the audited statement of accounts as at 31 December 1990 at p. 69 of encl. 41 under current assets due from a director, it meant that there is a sum of RM1,109,418.45 due and owing from a director namely Mohd Kamarul to the plaintiff.

**[15]** The defendant called for a creditor's meeting and on 26 April 2002 the defendant issued to their solicitors admitted the 1st proof of debt declaring that the plaintiff is entitled to receive the dividend in the amount of RM1,109,418.45.

**[16]** The admission of the 1st proof of debt by the defendant can be found at p. 80 of encl. 41 titled "Proof No. 5".

**[17]** There was an application by Mohd Kamarul to set aside the 1st proof of debt in the High Court. The application was granted because the amount owing from Mohd Kamarul was not specifically stated in the 1st proof of debt.

**[18]** PW1 then instructed their solicitors to refile the proof of debt, this time specifically stating the amount owing by Mohd Kamarul. Their solicitors *vide* letter dated 22 June 2004 filed a proof of debt ("the 2nd proof of debt") with supporting documents (pp. 51 to 58 of encl. 41). He (PW1) affirmed the 2nd proof of debt on 23 June 2004.

**[19]** There was no decision by the defendant on the 2nd proof of debt to either admit or reject the debt stated in the 2nd proof of debt. Their solicitors later discovered that there was an application by Mohd Kamarul to set aside the order of adjudication and receiving order, which was successfully annulled by the Deputy Registrar of the High Court. This was done without taking into account their 2nd proof of debt. They were never informed about the hearing of Mohd Kamarul's application and were not given any notice. Their solicitors only discovered later that the hearing was on 20 July 2004.

**[20]** Upon finding out, he instructed their solicitors to immediately file a writ of summons together with an injunction to stop Mohd Kamarul from receiving the return of the balance of his assets. However when the application was filed on 27 July 2004 they were unaware that the defendant had already released the remainder of Mohd Kamarul's assets. So they had to withdraw the action and the application because the defendant had already released the remainder of Mohd Kamarul's assets.

**[21]** In cross-examination, PW1 stated that the accounts as at 31 December 1992 at p. 225 of encl. 21 under item 4, it is stated that the suspense account represents amounts recorded in the accounting records of the company as due from directors, which are disputed by the directors. The same is also stated for the accounts for 1993, 1995, 1996 and 1997.

**[22]** The director who is disputing the debt he believed is Mohd Kamarul. The confirmation request at p. 60 of encl. 41 is undated and it refers to a debt that pre-date 1990. In re-examination, PW1 said Mohd Kamarul did owe the plaintiff money.

**[23]** Dato' Abdul Rahman bin Dato' Mohd Hashim ("PW2") in his witness statement ("PW2A") said that he is an advocate and solicitor practicing as a partner in Messrs Rahman Hashim & Partners. Previously the firm was known as Messrs Rahman Hashim, VT Ravindran & Partners.

**[24]** Dwitasik Sdn Bhd is a client of the firm. Dwitasik Sdn Bhd was previously known as Sportsbuild (M) Sdn Bhd. He was a director of the plaintiff from 1994 to 2004. He did not know Mohd Kamarul personally. Mohd Kamarul was a former director of the plaintiff.

**[25]** Mr Wong Kang Yeow, the manager of the plaintiff instructed his firm to file a claim against Mohd Kamarul to recover the monies owing under personal loans given by the plaintiff to Mohd Kamarul.

**[26]** Initially they commenced legal action against Mohd Kamarul to recover the debt. Subsequently they found out that Mohd Kamarul was actually made a bankrupt sometime in 1994. They withdrew the suit. After advising the plaintiff they received instructions to lodge a proof of debt which they did on 23 February 1999. The proof of debt ("the 1st proof of debt") was affirmed by Mr Wong Kang Yeow.

**[27]** The 1st proof of debt was rejected because it did not annex together the judgment and the statement of accounts of the plaintiff.

**[28]** By a letter dated 9 March 1999 he wrote to the defendant stating that Chong Sook Bee from the firm has called at the defendant's office to explain that they did not pursue judgment against Mohd Kamarul because he was already made a bankrupt. Through the letter, the statement of accounts as at 31 December 1994 of the plaintiff and the 1st proof of debt were enclosed.

**[29]** The defendant accepted the lodgment of the 1st proof of debt on 9 March 1999.

**[30]** There was no notice at all from the defendant until 2001. By letters dated 16 February 2001 and 10 October 2001 the defendant requested further documents. His firm responded by letters dated 17 October 2001 and 18 October 2001. Through their letter dated 18 October 2001 they enclosed further documents as requested.

**[31]** Sometime in December 2001 his firm received a notice to attend a creditors' meeting. He attended the meeting on 12 December 2001. After the first meeting there was a follow up meeting on 27 December 2001 during which he met the defendant's accountant named Cik Rozaidah Hj Othman to give an explanation on the documents they provided through their letter dated 18 October 2001.

**[32]** On 26 April 2002, they received a document titled "proof No. 5". (p. 80 of encl. 41). The proof No. 5 is a notice by the defendant admitting the 1st proof of debt filed and confirming that the plaintiff is entitled to receive a dividend of RM1,109,418.45.

**[33]** His client did not receive any dividend because Mohd Kamarul applied to the Shah Alam High Court to set aside the defendant's acceptance of the 1st proof of debt. The Shah Alam High Court allowed the application on a highly technical basis. His firm then immediately lodged a 2nd proof of debt.

**[34]** Mohd Kamarul's application was allowed and the reason given by the High Court was that the amount owed by Mohd Kamarul which is RM1,109,418.45 was not specifically stated in the 1st proof of debt. This can be seen from the notes of proceedings of the High Court at p. 409 of encl. 41. The Shah Alam High Court set aside the 1st proof of debt on 11 June 2004.

**[35]** After advising the plaintiff and taking instructions from them, his firm filed another proof of debt. Since the Shah Alam High Court had set aside proof No. 5 on purely technical grounds, ie, that the amount by Mohd Kamarul was not specifically stated in the 1st proof of debt even though the supporting documents would clearly show the amount owed by Mohd Kamarul. Due to the highly technical nature of the setting aside, they lodged afresh the proof of debt ("the 2nd proof of debt") again. This time clearly specifying the amount owed.

**[36]** The 2nd proof of debt was lodged on 23 June 2004 *vide* their letter dated 22 June 2004 which was received by the defendant on 23 June 2004 together with the supporting documents. The defendant accepted the lodgment of the 2nd proof of debt on 23 June 2004.

**[37]** He called the office of the defendant several times to enquire about the status of the 2nd proof of debt lodged on 23 June 2004. There was no notice of any decision of the defendant on the 2nd proof of debt.

**[38]** At that time Mohd Kamarul was still a bankrupt. He subsequently discovered that Mohd Kamarul managed to have the order of adjudication and receiving order annulled by the Deputy Registrar of the High Court on 20 July 2004 by way of an

application to the High Court. However the defendant did not inform his firm of the hearing date before the Deputy Registrar of the High Court.

**[39]** He also subsequently discovered that the defendant did not object to the annulment nor bring to the attention of the Deputy Registrar that there was the 2nd proof of debt lodged on 23 June 2004 which remains unexamined at that time during the hearing. He found out after conducting a search from the court file. It was there that he discovered that the defendant had submitted a report dated 16 July 2004.

**[40]** Nothing was mentioned in the file regarding the 2nd proof of debt. The defendant again failed to inform the Deputy Registrar of the 2nd proof of debt lodged on 23 June 2004 during the hearing.

**[41]** The plaintiff immediately instructed his firm to pursue the matter by initiating a legal action to stop the release of any remaining assets to Mohd Kamarul.

**[42]** So on 27 July 2004, a writ of summons together with an *ex parte* application for injunction was filed namely Suit No. 22-615-2004.

**[43]** However the application filed was too late. Unknown to them, the defendant had already released to Mohd Kamarul the balance of the assets on 26 July 2004. After they found out, they withdrew the writ action.

**[44]** His firm sent a letter dated 27 August 2004 (pp. 96 to 98 of encl. 41) to the defendant to express the plaintiff's unhappiness over the defendant's acts and omissions and expressly reserving the rights of the plaintiff.

**[45]** In cross-examination PW2 said that in the audited accounts of the plaintiffs for 1994, 1995, 1996 and 1997 there are notations which reads "The suspense account represents amounts recorded in the accounting records of the company as due from present and past directors, which are disputed by the directors." He agreed that the audited accounts of the plaintiff shows that at all times Mohd Kamarul disputed the debt.

**[46]** With reference to p. 409 of encl. 41, he was not served the application to set aside the 1st proof of debt but a solicitor from his firm was present during the proceedings but he was not the counsel present. He agreed that the judge set aside the 1st proof of debt because it did not disclose the amount of the debt from the debtor and the consideration for the same.

**[47]** He did not appeal against the order. They did not complain about the defendant's failure to appeal against the order.

**[48]** The 2nd proof of debt was for the same debt.

**[49]** In re-examination PW2 said in the 1990 audited accounts of the plaintiff Mohd Kamarul has signed the audited accounts for that year in which he was the managing director where he had agreed on behalf of the plaintiff that the amount owing by him in his personal capacity is due to the plaintiff.

**[50]** After 1991, Mohd Kamarul was no longer the managing director of the plaintiff. So Mohd Kamarul was seeking to deny the debt to the plaintiff.

**The Case For The Defendant Is As Follows:**

**[51]** Zalina binti Hj Awang @ Mamat (DW1) dalam pernyataan saksinya (DW1A) berkata beliau bertugas sebagai Pengarah Insolvensi Negeri Selangor, Shah Alam dari 1 Jun 2004 hingga 14 Ogos 2006. Dalam tempoh ini beliau bertanggungjawab mengendalikan pentadbiran estet Mohd Kamarul yang telah dihukum bankrap 4 Februari 1994.

**[52]** Pada 9 Mac 1999 plaintif memfailkan borang bukti hutang pertama dengan dokumen sokongan.

**[53]** Pada 16 Februari 2001 defendan meminta plaintif mengemukakan dokumen-dokumen sokongan.

**[54]** Pada 10 Oktober 2001 defendan menghantar peringatan kepada plaintif untuk mengemukakan dokumen sokongan. Pada 18 Oktober 2001 Plaintif mengemukakan dokumen sokongan.

**[55]** Pada 27 Oktober 2001 mesyuarat pemiutang dengan plaintif.

**[56]** Pada 26 April 2004 borang bukti hutang pertama diperaku dan salinan dihantar kepada plaintif.

**[57]** Si bankrap (Mohd Kamarul) telah merayu terhadap keputusan defendan memperaku borang bukti hutang pertama plaintif bertarikh 9 Mac 1999 melalui permohonan bertarikh 12 Februari 2001 di Mahkamah Tinggi Shah Alam.

**[58]** Si bankrap mempertikaikan borang bukti hutang tersebut atas alasan hutang tersebut tidak benar dan telah menjadi pertikaian sejak 1991. Menurutnya pertikaian ini telah diutarakan dalam penyata akaun tahunan plaintif (ms. 142-333 lampiran 41). Mahkamah telah menerima hujah si bankrap dan telah mengenepikan borang bukti hutang pertama plaintif tersebut kerana borang bukti hutang tersebut tidak menunjukkan jumlah dan sebab-sebab keberhutangan si bankrap. (ms. 409 & 439-440 lampiran 41).

**[59]** Defendan tidak memaklumkan plaintif berkenaan permohonan si bankrap untuk menolak keputusan defendan memperaku borang hutang plaintif tersebut. Plaintif ada diwakili dalam prosiding tersebut. Plaintif diwakili oleh peguam En Nor Amir bin Ahmad. Encik Nor Amir menyerahkan isu tersebut kepada budi bicara mahkamah (ms. 409 lampiran 41).

**[60]** Defendan tidak merayu terhadap keputusan Mahkamah Tinggi Shah Alam bertarikh 11 Jun 2004 kerana defendan bersetuju dan menerima keputusan YA Hakim tersebut.

**[61]** Plaintif tidak merayu terhadap keputusan tersebut. Sebaliknya plaintif memfailkan borang bukti hutang baru. ("borang bukti hutang kedua plaintif") pada 23 Jun 2004 (ms. 82-89 lampiran 41).

**[62]** Plaintif berhak untuk merayu terhadap keputusan tersebut ke Mahkamah Rayuan di bawah s. 67 Akta Mahkamah Kehakiman 1964.

**[63]** Plaintif tidak pernah mengadu berkenaan kegagalan defendan merayu terhadap keputusan tersebut. Aduan tersebut dibangkitkan buat pertama kali dalam tindakan ini.

**[64]** Defendan telah menolak borang bukti hutang kedua plaintif tanpa memeriksanya kerana borang bukti hutang itu adalah untuk jumlah dan tuntutan yang sama seperti dalam borang bukti hutang pertama plaintif yang telahpun diketepikan oleh Mahkamah Tinggi

Shah Alam pada 11 Jun 2004. Tambahan pula plaintif tidak mengemukakan sebarang dokumen baru untuk menyokong borang bukti hutang keduanya.

**[65]** Plaintif dimaklumkan berkenaan penolakan borang bukti hutang keduanya pada 23 Ogos 2004.

**[66]** Defendan tidak bertanggungjawab untuk memperaku borang bukti hutang kedua plaintif.

**[67]** Plaintif boleh merayu terhadap keputusan defendan pada 23 Ogos 2004 yang menolak borang bukti hutang kedua plaintif di bawah k. 186 Kaedah-Kaedah Kebankrapan 1969. Plaintif tidak merayu terhadap keputusan itu. Apabila menerima permohonan si bankrap untuk pembatalan perintah kebankrapan terhadapnya, defendan telah menyemak status estet si bankrap dan beliau telah menyediakan laporan bertarikh 16 Julai 2004 (ms. 90-92 Lampiran 41) untuk mahkamah.

**[68]** Bukti hutang kedua plaintif tidak dinyatakan dalam laporan tersebut kerana pada masa tersebut bukti hutang kedua plaintif belum diperiksa lagi.

**[69]** Defendan tidak mempunyai kewajipan untuk memaklumkan Plaintif berkenaan permohonan si bankrap tersebut. Memandangkan permohonan itu dibuat oleh si bankrap adalah menjadi tanggungjawab si bankrap untuk memaklumkan pemiutang-pemiutangnya.

**[70]** Dalam kes ini si bankrap telah memaklumkan pemiutang-pemiutangnya yang hutang mereka telah diperaku oleh defendan dan tidak dipertikaikan oleh si bankrap.

**[71]** Defendan tidak mempunyai kewajipan untuk membantah atau menyokong permohonan tersebut.

**[72]** Defendan tidak mempunyai kewajipan untuk memaklumkan mahkamah berkenaan borang bukti hutang kedua plaintif semasa pendengaran permohonan tersebut kerana pada masa tersebut borang bukti hutang kedua plaintif belum diperiksa lagi.

**[73]** Defendan tidak mempunyai kewajipan untuk merayu terhadap keputusan Mahkamah Tinggi membatalkan perintah kebankrapan terhadap si bankrap.

**[74]** Plaintif mempunyai hak untuk merayu terhadap keputusan Mahkamah Tinggi tersebut ke Mahkamah Rayuan di bawah s. 67 Akta Mahkamah Kehakiman 1964.

**[75]** Selepas pembatalan perintah kebankrapan terhadap si bankrap defendan telah melepaskan wang lebihan dalam estet si bankrap kepadanya pada 26 Julai 2004 susulan dari perintah mahkamah tersebut.

**[76]** Defendan tidak mempunyai kewajipan untuk memaklumkan plaintif berkenaan pelepasan wang lebihan kepada si bankrap.

**[77]** Defendan mengetahui berkenaan tindakan Plaintif untuk sesuatu perintah injunksi untuk menghalang si bankrap daripada menerima wang lebihan estetnya daripada defendan. Plaintif telah memfailkan suatu tindakan di Mahkamah Tinggi Shah Alam melalui Guaman Sivil No. MT3-22-615-2004. Walau bagaimanapun Plaintif kemudiannya telah menarik balik tindakan tersebut.

**[78]** Dalam soal balas DWI berkata borang bukti hutang kedua plaintif telah diperiksa pada 23 Ogos 2004 dan ditolak. Dalam laporan di ms. 90-92 lampiran 41 borang bukti kedua plaintif tidak dinyatakan.

**[79]** Pada masa perbicaraan pada 20 Julai 2004 beliau tidak pasti sama ada wakil defendan ada membawa ke perhatian mahkamah wujudnya borang bukti hutang kedua plaintif.

**[80]** Pada 23 Ogos 2004 Mohd Kamarul tidak seorang bankrap kerana dibatalkan pada 20 Julai 2004.

**[81]** Beliau bersetuju di ms. 409 lampiran 41 bahawa beliau ada kata "Concede the proof of debt should have been rejected".

**[82]** Jika borang bukti hutang kedua plaintif diterima dan campur dengan tiga pemiutang lain iaitu Malayan Banking Berhad, Maybank Finance Berhad dan Southern Finance Berhad jumlah hutang bagi estet si bankrap ialah RM1,181,693.65.

**[83]** Dan baki kredit dalam estet si bankrap adalah RM962,925.76.

**[84]** Pihak defendan tidak memberitahu plaintif berkenaan permohonan si bankrap untuk membatalkan kebankrapannya.

**[85]** Dividen yang diperaku di dalam laporan beliau adalah 'a final dividend' di bawah s. 66 Akta Kebankrapan. Notis di bawah s. 66(6) Akta Kebankrapan tidak diberi kepada plaintif kerana plaintif adalah pemiutang yang tidak diperakui.

**[86]** Dalam pemeriksaan semula DWI berkata tidak ada kewajipan defendan untuk menyediakan laporan Ketua Pengarah Insolvensi untuk diserahkan kepada Mahkamah dalam permohonan pembatalan di bawah 105.

**[87]** The learned counsel for the plaintiff has put in a written submission dated 13 October 2009.

**[88]** The learned Senior Federal Counsel for the defendant has put in a written submission dated 6 November 2009.

**[89]** The learned counsel for the plaintiff has put in a written reply dated 16 November 2009.

**[90]** I have considered all the written submissions. I shall now give my judgment.

**[91]** From the evidence adduced by both parties I make the following findings:

(a) the plaintiff has filed the 1st proof of debt on 9 March 1999 for RM1,109,418.45 against Mohd Kamarul;

(b) on 26 April 2002 the defendant admitted the 1st proof of debt *vide* p. 80 of encl. 41 for the debt of RM1,109,418.45;

(c) on 12 February 2001 Mohd Kamarul filed an application (pp. 138 to 140 of encl. 41) for an order, *inter alia*, "Selanjutnya, sekiranya Borang-Borang Bukti Hutang tersebut telah diterima oleh Pegawai Pemegang Harta, si bankrap memohon agar keputusan penerimaan tersebut dibatalkan dan ditolak oleh mahkamah yang mulia ini";

(d) on 11 June 2004 the court granted an order "bahawa penerimaan Borang Bukti Hutang yang telah difailkan oleh Dwitasik Sdn Bhd pada 9 haribulan Mac 1999 oleh Pegawai Pemegang Harta diketepikan dan akhirnya diperintahkan bahawa tiada sebarang peruntukan dibuat berhubung dengan kos" (pp. 4-5 of encl. 41);

(e) the plaintiff lodged the 2nd proof of debt on 23 June 2004 to specifically insert the amount of RM1,109,418.45 and state the consideration of personal loans;

(f) the defendant was aware of the 2nd proof of debt lodged on 23 June 2004;

(g) Mohd Kamarul was still a bankrupt and his properties were under the control of the defendant when the 2nd proof of debt was lodged on 23 June 2004;

(h) the defendant did not inform the plaintiff of the annulment application by Mohd Kamarul and its hearing on 20 July 2004;

(i) the defendant did not examine the 2nd proof of debt lodged by the plaintiff on 23 June 2004 until 23 August 2004.

(j) *vide* the order dated 20 July 2004 (pp. 6-7 of encl. 41) by the Deputy Registrar of the High Court the receiving order and adjudication Order against Mohd Kamarul was annulled on 20 July 2004;

(k) the defendant released the balance money to the bankrupt (Mohd Kamarul) on 26 July 2004.

**The 1st Issue For The Court To Decide Is Whether The Order Granted On 11 June 2004 By The Shah Alan, High Court Was On The Merits Or Otherwise**

**[92]** The order granted on 11 June 2004 is at pp. 4 and 5 of encl. 41 which relevant parts at p. 5 reads as follows:

> MAKA ADALAH DIPERINTAHKAN bahawa
> penerimaan Borang Bukti Hutang yang telah difailkan oleh Dwitasik Sdn Bhd pada 9 haribulan Mac 1999 oleh Pegawai Pemegang Harta diketepikan
>
> DAN AKHIRNYA DIPERINTAHKAN bahawa
> tiada sebarang peruntukan dibuat berhubung dengan kos.

**[93]** In the order dated 11 June 2004 it is clearly recited that the acceptance of the form is set aside. The order did not say that "admission" or "akuan" of the proof of debt was set aside. This can only point towards the acceptance of the Form and not the admission of the proof of debt. The language of the order is clear and unambiguous ie, the acceptance of the form was set aside.

**[94]** Page 409 of encl. 41 is the notes of proceedings before His Lordship Dato' KN Segara in the Shah Alam High Court on 11 June 2004 which relevant parts reads as follows:

...

...

En. Iza Aziz b/p pemohon b/p bankrap (bersama En. Mohd Mos) Cik Zalina bt. Haji Awang b/p Jab. Insolvensi Malaysia (Jab. Pemegang Harta).
En. Nor Amir Ahmad b/p Dwitasik Sdn. Bhd.

By Ct: Exhibit KB1 enc.39 Affidavit proof of debt by Dwitasik Rule: 178 No. 62 – does not disclose the amount as debt from debtor and the consideration for same. Why was this not rejected outright.

Cik Zalina: Concede the proof of debt should have been rejected.

En. Nor Amir: I have nothing to say. Leave to Court.

Mahk: Penerimaan borang bukti hutang Dwitasik oleh Pegawai Pemegang Harta diketepikan.

**[95]** From the notes of proceedings it is clear that the learned judge was referring to r. 178 of the Bankruptcy Rules 1969 and Form 62 under the said rules which provides for proof of debt form. And the emphasis in the question by the learned judge is very clear, the learned judge asked why the form was not "rejected outright" as the amount and the consideration were not stated in the form.

**[96]** The use of the words "rejected outright" in the question indicates a single purpose, that is a rejection of the form without looking into the merits of the debt.

**[97]** I agree with the contention of the plaintiff that the court did not go beyond the form and was solely concerned with a point of form, and not on the merits.

**[98]** The setting aside of the 1st proof of debt by the High Court on 11 June 2004 was on the technical ground that the amount and the consideration were not stated in the 1st proof of debt form and not on the merits.

**[99]** Hence the defendant's underlining premise for her whole submission ie, that the "admission" of the 1st proof of debt was set aside "on the merits", is baseless.

**[100]** In *Re Deerhurst, Ex Parte Seaton (1891) Morrell's Bankruptcy Reports 258*, His Lordship Cave J at p. 262 said:

> So also, if the proof is objected to and is rejected not on the merits but on something going to a matter of form, the creditor would be justified in giving another proof avoiding the point of form objected to, because there the objection is not to the merits but to the form.

**[101]** This case held that when the rejection was on a point of form, another proof of debt can be presented without first withdrawing the rejected proof of debt.

**[102]** It follows that the 2nd proof of debt lodged with the defendant on 23 June 2004 to specifically state in the 2nd proof of debt form itself the amount of RM1,109,418.45 and the consideration is perfectly proper in law.

**[103]** Based on the principle in *Re Deerhurst, Ex Parte Seaton (supra)* the plaintiff is entitled to present afresh the 2nd proof of debt which the plaintiff did instead of an appeal.

**[104]** In *Hup Hin Soon Sdn Bhd v. Chong Kin Lin & Anor* [2002] 5 MLJ 356 the court held that when the court had not gone into the merits, there was nothing to appeal against and the plaintiff was perfectly at liberty to refile the suit.

**[105]** I find in our case that the plaintiff has nothing to appeal against. The plaintiff is perfectly at liberty to file a fresh proof of debt ie, the 2nd proof of debt.

**[106]** Rule 26 in Schedule C of the Bankruptcy Act 1967 which was made under s. 42 of the Bankruptcy Act 1967 reads as follows:

> 26. The Director General of Insolvency shall examine every proof and the grounds of the debt, and in writing admit or reject it whole or in part or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

**[107]** The words used in r. 26 namely "shall examine every proof and the grounds of the debt" clearly denotes that this provision is a mandatory provision and a duty imposed on the part of the defendant to examine every proof of debt.

**[108]** Further s. 42 of the Bankruptcy Act 1967 expressly provides that "the rules in Schedule C shall be observed ... "

**[109]** It is the statutory duty of the defendant to examine the 2nd proof of debt lodged on 23 June 2004 as the property of Mohd Kamarul was still vested in the defendant.

**[110]** The defendant has breached its statutory duty by not examining the 2nd proof of debt and informing the plaintiff whether the 2nd proof of debt was accepted or rejected before the hearing of the annulment application on 20 July 2004.

**[111]** DW1 admitted that she only examined the 2nd proof of debt on 23 August 2004 and rejected it on 23 August 2004 after the annulment on 20 July 2004 when Mohd Kamarul was no longer a bankrupt and when the defendant no longer has any power to admit or reject a proof of debt.

**[112]** The rejection of the 2nd proof of debt on 23 August 2004 *vide* a letter received by the plaintiff's solicitors on 30 August 2004 has become academic as the annulment was given on 20 July 2004 and the balance of Mohd Kamarul's monies released to him on 26 July 2004.

**[113]** Section 66 of the Bankruptcy Act 1967 reads as follows:

> **66. Final dividend**
>
> (1) When the Director General of Insolvency has realized all the property of the bankrupt, or so much thereof as can, his opinion, be realized without needlessly protracting the proceedings in bankruptcy, he shall declare a final dividend.
>
> (2) Before so doing he shall give notice as prescribed to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the court within a time limited by the notice he will proceed to make a final dividend without regard to their claims.

(3) After the expiration of the time so limited, or if the court, on application by any such claimant, grants him further time for establishing his claim, then on the expiration of such further time, the property of the bankrupt shall be divided among the creditors who have proved their debts without regard to the claims of any other persons.

**[114]** DW1 admitted that the dividend in her report dated 16 July 2004 was a final dividend.

**[115]** Section 66(2) of the Bankruptcy Act 1967 is a mandatory provision because of the words "he shall give notice ... " and the defendant must give a notice to the plaintiff.

**[116]** However no notice under s. 66(2) of the Bankruptcy Act 1967 was given to the plaintiff on this declaration of final dividend.

**[117]** The plaintiff's 2nd proof of debt was filed on 23 June 2004 and the defendant was aware of the existence of the 2nd proof of debt, the failure on the part of the defendant to give notice is a clear breach of its statutory duty.

**[118]** The defendant was aware that the hearing date for the annulment of the bankruptcy was fixed on 20 July 2004. The defendant was aware that the 2nd proof of debt was lodged with the defendant on 23 June 2004. Therefore it was the duty of the defendant to inform the plaintiff of this application. However the defendant did not notify the plaintiff of the said application.

**[119]** Rule 26 in Schedule C of the Bankruptcy Act 1967 which stipulates that "The Director General of Insolvency shall examine every proof and the grounds of the debt" protect the creditors who have filed proof of debt in that their proof of debt will have to be examined for admission or rejection; an admission would entitle them to recover the debt through the dividend and a rejection would give them a right to appeal.

**[120]** I agree with the contention of the plaintiff that the Bankruptcy Act 1967 by r. 26 in sch. C is intended to protect the creditors of debt provable in bankruptcy who have filed proof of debt.

**[121]** Similarly the statutory duty to give notice under s. 66(2) of the Bankruptcy Act 1967 is intended to protect creditors whose claims have been notified to the defendant, but not established to its satisfaction yet.

**[122]** Under r. 28 in Schedule C, a creditor who is dissatisfied with the decision of the defendant in respect of proof can apply to the court to reverse or vary the decision.

**[123]** In our case there was no decision until 23 August 2004 when the 2nd proof of debt was rejected and this decision was only received by the plaintiffs solicitors on 30 August 2004. By this time the bankruptcy had been annulled on 20 July 2004 and the remaining monies had been released to Mohd Kamarul on 26 July 2004.

**[124]** And under s. 92(1) of the Bankruptcy Act 1967 the court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

**[125]** However there was no order made by the court in respect of the 2nd proof of debt lodged on 23 June 2004 as the defendant did not make any decision thereon during the pendency of the bankruptcy.

**[126]** It can be noted that the remedies provided under the Bankruptcy Act 1967 were only available during the pendency of the bankruptcy or within the 14 day period provided under r. 89(b) of the Bankruptcy Rules 1969 to lodge an appeal.

**[127]** The annulment order was made by the deputy registrar without notice to the plaintiff. The balance of the monies was released to Mohd Kamarul on 26 July 2004 even before the 14 day period under r. 89(b) of the Bankruptcy Rules 1969 provided to lodge an appeal against the annulment of 20 July 2004 had expired.

**[128]** There is no remedy under the Bankruptcy Act 1967 as the bankruptcy has been annulled on 20 July 2004 and the balance of the monies released to Mohd Kamarul on 26 July 2004 without the knowledge of the plaintiff.

**[129]** As such I find the defendant liable to the plaintiff for breach of its statutory duties.

**[130]** In the case of *Hu Sepang v. Inspector Keong On Eng & Ors* [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 His Lordship Lim Beng Choon J at p. 742 said:

> Finally I must remind myself that if a statute creates a duty but imposes no remedy civil or criminal for its breach, there is a presumption that a person who is injured thereby will have a right of action for otherwise 'the statute would be but a pious aspiration'.

**[131]** I find that the plaintiff has prove its case on a balance of probabilities against the defendant.

**[132]** The defendant had agreed that the balance in Mohd Kamarul's account would not be sufficient to pay off the creditors, including the plaintiff should the plaintiffs 2nd proof of debt be admitted. However the defendant still chose to go ahead to release the balance monies to Mohd Kamarul without having regard to the plaintiff's rights at all.

**[133]** The defendant could forsee that the plaintiff would suffer losses and damage caused by the defendant's breach of statutory duties.

**[134]** According to the report (pp. 90-92 of encl. 41) total claim by Malayan Banking Bhd, Mayban Finance Bhd and Southern Finance Bhd amounts to RM72,275.20 and the balance credit of the bankrap was RM962,925.76. So RM962,925.76 minus RM72,275.20 equals to RM890,650.56.

**[135]** Had the plaintiff's 2nd proof of debt of RM1,109,418.45 been accepted by the defendant, the plaintiff would be entitled to only RM890,650.56.

**[136]** Due to the defendant's breach of statutory duties to the plaintiff, the plaintiff has suffered this loss of RM890,650.56.

**[137]** In conclusion I therefore enter judgment for the plaintiff as follows:

(a) the defendant to pay the plaintiff the sum of RM890,650.56 together with interest thereon at 4% per annum from the filing of the writ to the date of judgment and thereafter at 8% per annum till realisation;

(b) I disallow the claim for damages and exemplary damages as there are no basis for such awards;

(c) Lastly I order the defendant to pay costs to the plaintiff for this action.